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# In the Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA, PETITIONER

*v.*

JOHN CHRISTOPHER BEALE

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-17a) is reported at 674 F.2d 1327.[1]

### JURISDICTION

The judgment of the court of appeals (App. A, *infra*, 17a) was entered on April 22, 1982. A petition for rehearing was denied on August 5, 1982 (App. C, *infra*, 19a). On September 20, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The opinion as reported does not contain the modifications made by the court of appeals in its July 21, 1982, amendment to the decision. See App. B, *infra*, 18a.

## STATEMENT

Following the denial of his suppression motion, respondent was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (App A, *infra*, 1a, 4a). He was sentenced to concurrent terms of 30 months' imprisonment on each count, to be followed by a seven-year special parole term. The court of appeals vacated the conviction on the ground that the district court had erred in denying the suppression motion.

1. The evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[2] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed respondent and co-defendant Joseph Pulvano[3] leave a taxicab, check three pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas. Detective Berks also examined the labels on the defendants' luggage and noticed that Pulvano was watching him while he examined the bags (App. A, *infra*, 2a; Tr. 6-7; Stip. 2-3).

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[2] Respondent's trial consisted of the filing of a stipulation ("Stip.") by the parties to certain facts developed during the suppression hearing, which was made a part of the trial record, and the entry of a guilty verdict by the court on the basis of the stipulated facts (Tr. 80-82).

[3] Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's license; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on a narcotics charge six years earlier. Detective Berks then thanked them for their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (App. A, *infra*, 2a-3a; Tr. 8-10; Stip. 3).

While Detective Berks was speaking with respondent and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his conversation with the defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that respondent and Pulvano had checked. The dog immediately "alerted" to respondent's large maroon suitcase, indicating that it contained narcotics (App. A, *infra*, 3a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (App. A, *infra*, 3a; Tr. 12-13; Stip. 3-4). Police officers in Houston kept respondent and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (App. A, *infra*, 3a; Tr. 14; Stip. 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As they reached the front of the terminal, Pulvano stopped at a telephone; respondent

walked directly to a taxi without making any effort to retrieve his luggage (App. A, *infra*, 3a; Tr. 49-50; Stip. 5). Police officers then approached respondent and asked him about his luggage. In response, he stated falsely that he was traveling alone and that he had lost his claim ticket. Thereupon the officers advised him that he was under arrest and escorted him back to the terminal (App. A, *infra*, 3a; Tr. 50-53; Stip. 5-6).

While respondent and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to respondent's large maroon suitcase (App. A, *infra*, 3a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotics Task Force Office where he consented to a search of all the bags except the maroon suitcase (App. A, *infra*, 4a; Tr. 30-32; Stip. 7). Subsequently, when respondent arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that respondent had been carrying (App. A, *infra*, 4a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a search warrant from a state court judge for the two suitcases to which the dog had alerted. The ensuing search revealed that respondent's shoulder bag contained approximately one kilogram of cocaine and that the maroon suitcase contained approximately 137 grams of marijuana (App. A, *infra*, 4a; Tr. 35; Stip. 8).

2. The district court denied the motions of respondent and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 72-78). The court rejected the contention that probable cause was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not a search under the Fourth Amendment" (App. A, *infra*, 5a n.4; Tr. 72).

3. The court of appeals vacated the conviction and remanded (App. A, *infra*, 1a-17a). The court held that "the use of a canine's keen sense of smell to detect the presence

of contraband within personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable cause" (*id.* at 15a; footnote omitted; emphasis deleted).[4] Accordingly, the court of appeals remanded to the district court for a determination whether the officers who exposed respondent's luggage to a trained dog at the Fort Lauderdale airport possessed the requisite suspicion that it contained contraband (*id.* at 16a-17a).

The court explained that the Fourth Amendment "'protects people from unreasonable government intrusions into their legitimate expectations of privacy'" (App. A, *infra*, 7a, quoting *United States* v. *Chadwick*, 433 U.S. 1, 7 (1977)). The use of a trained dog to detect contraband within personal luggage, the court stated, violated such an expectation of privacy. The court acknowledged that if the odor of drugs emanating from a suitcase were detectable by the human nose, there would be no Fourth Amendment intrusion (App. A, *infra*, 10a), but it held that the use of a trained dog did constitute such an intrusion. The court explained (*id.* at 12a-13a; footnote omitted):

> The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest in the contents of the container. * * *
>
> To paraphrase *Katz* [v. *United States*, 389 U.S. 347 (1967)], what [respondent] sought to exclude when he locked his suitcase was not only the intruding human eye—it was also the intruding canine nose. One who reposes his personal effects, including contraband, in a

[4] The court rejected respondent's contention that the officers' approach to him in Fort Lauderdale violated the Fourth Amendment. The court held that the situation was "non-coercive" and that respondent and Pulvano answered the questions "'in a spirit of apparent cooperation'"; hence, the encounter was not a "seizure" under the Fourth Amendment. See App. A, *infra*, 4a-5a.

> locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.

Hence, the court concluded that the Fourth Amendment requires a threshold of reasonable suspicion[5] before law enforcement officers may employ a dog to determine whether or not a suitcase contains contraband (*id.* at 15a).[6]

## REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning the restrictions, if any, that the Fourth Amendment imposes upon the use of specially trained dogs to assist in the detection of illegal narcotics traffic. The court of appeals' holding that the use of a trained dog to detect the presence of narcotics contained in personal luggage constitutes a "search" within the meaning of the Fourth Amendment that must be predicated upon reasonable suspicion directly conflicts with the decisions of six other courts of appeals and the highest courts of four States. Moreover, it is contrary to well established principles of Fourth Amendment law. If permitted to stand, it will have a substantial adverse impact upon the efforts of law enforcement authorities to reduce the illicit drug traffic at major airports and elsewhere.

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[5] The court of appeals rejected respondent's contention that dog sniffs are indistinguishable from the use of a magnetometer or an x-ray machine and hence unlawful in the absence of probable cause. Finding that the use of narcotics detection dogs is less intrusive than such techniques because a dog detects only the presence or absence of contraband, the court held that a less rigorous standard than probable cause was appropriate. See App. A, *infra*, 13a-14a.

[6] The court of appeals recognized that its decision was contrary to decisions in several other courts of appeals (App. A, *infra*, 6a-7a, 15a n.20). The court stated that, in its view, those decisions holding dog sniff tests of luggage to be permissible in the absence of reasonable suspicion were no longer sound in light of this Court's decision in *United States* v. *Chadwick*, *supra*, which recognized the importance of an individual's privacy interest in personal luggage (App. A, *infra*, 6a-8a, 10a). With respect to those contrary court of appeals decisions rendered subsequent to *Chadwick*, the court below announced that it "decline[d] to follow them" (App. A, *infra*, at 15a n.20).

1. Other courts of appeals have long recognized that the use of dogs trained to detect contraband by sniffing the airspace surrounding luggage does not constitute a search within the meaning of the Fourth Amendment. For example, in *United States* v. *Fulero*, 498 F.2d 748, 749 (D.C. Cir. 1974), the court dismissed as "frivolous" the defendant's argument that the sniffing by a trained dog of footlockers at a bus terminal constituted an unconstitutional intrusion into the lockers. In *United States* v. *Bronstein*, 521 F.2d 459 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976), the court likewise held that the use of a trained dog to detect the odor of marijuana emanating from luggage on an airport baggage carousel did not constitute a search within the meaning of the Fourth Amendment. The court reasoned (521 F.2d at 461):

> If the police officers here had detected the aroma of the drug through their own olfactory senses, there could be no serious contention that their sniffing in the area of the bags would be tantamount to an unlawful search. * * * We fail to understand how the detection of the odoriferous drug by the use of the sensitive and schooled canine senses here employed alters the situation and renders the police procedures constitutionally suspect.

Accord, *United States* v. *Johnson*, 660 F.2d 21, 22 (2d Cir. 1981). In *United States* v. *Goldstein*, 635 F.2d 356 (5th Cir.), cert. denied, 452 U.S. 962 (1981), the court specifically rejected the contention that reasonable suspicion is a prerequisite to a dog sniff. The court explained that the sniffing of the exterior of the defendant's bags "was not an intrusion into an area protected by the Fourth Amendment" because it did not expose the contents of the luggage. 635 F.2d at 360-361. Accord, *United States* v. *Viera*, 644 F.2d 509, 510 (5th Cir.), cert. denied, 454 U.S. 867 (1981).[7] Three other circuits have reached the same result. See *United States* v.

[7] But cf. *Horton* v. *Goose Creek Independent School District*, 677 F.2d 471, 478-482 (5th Cir. 1982), where the court distinguished cases involving checked luggage and held that the use of trained drug detection dogs to sniff school students, their lockers, and their automobiles constituted a search within the meaning of the Fourth Amendment that required individualized suspicion.

*Klein*, 626 F.2d 22, 26-27 (7th Cir. 1980); *United States* v. *Sullivan*, 625 F.2d 9, 13 (4th Cir. 1980), cert. denied, 450 U.S. 923 (1981); *United States* v. *Burns*, 624 F.2d 95, 100-101 (10th Cir.), cert. denied, 449 U.S. 954 (1980); *United States* v. *Venema*, 563 F.2d 1003, 1005-1006 (10th Cir. 1977). See also *United States* v. *Race*, 529 F.2d 12, 14 n.2 (1st Cir. 1976) (asserting that there is no Fourth Amendment question raised by the use of a sniffing dog for a routine check of freight in an airport warehouse).[8]

The court of appeals' view that the above cases are inconsistent with this Court's decisions in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), and *United States* v. *Chadwick*, 433 U.S. 1 (1977), plainly cannot withstand analysis. Those cases were concerned solely with the question whether probable cause searches of luggage could be valid in the absence of resort to the warrant procedure—an issue not present here. While *Chadwick* and *Sanders* recognize the existence of a privacy interest in the contents of personal luggage, a proposition that was hardly in doubt before, they do not suggest in any way that a dog sniff of the airspace surrounding the luggage intrudes on that privacy interest. See *United States* v. *Waltzer*, 682 F.2d 370, 373 (2d Cir. 1982), in which the court specifically rejected the decision below on this ground, stressing that the limited information revealed by the dog sniff, which discloses only the presence or absence of contraband, makes the procedure entirely different from the opening of luggage and consequent visual inspection of its contents.[9]

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[8] Indeed, even the Ninth Circuit in a prior decision had rejected the view that a dog sniff of the outside of a truck trailer was a search, stating rather that it was simply a "monitoring of the air in an area open to the public." *United States* v. *Solis*, 536 F.2d 880, 881 (1976).

[9] *Waltzer* also demonstrates the error of the suggestion of the court below (App. A, *infra*, 14a-15a) that its decision is "consistent with the unarticulated reasoning" of *Brousstein*, *supra*. While it is true that in some of the decisions holding a dog sniff not to be a search it appears that the police did have reasonable suspicion of criminal activity, that was not the basis of those decisions, which flatly held that the dog sniff was not a search. Indeed, the court below itself recognized that there was no rea-

Unless the conflict in the circuits engendered by the decision below is resolved, there will be a serious adverse effect on the enforcement of the narcotics laws. Both state and federal law enforcement officials use trained narcotics detection dogs to examine luggage arriving at airports and other passenger terminals, particularly luggage arriving from cities known as major sources of drug traffic. Because an "alert" to a particular bag generally establishes probable cause to believe that the bag contains contraband (see, *e.g.*, *United States* v. *Waltzer*, *supra*, 682 F.2d at 372), the use of these dogs results in the seizure of substantial amounts of contraband. In many cases, narcotics agents may wish to spot check a particular shipment of luggage or to check a particular piece of luggage that they suspect may contain contraband, although the basis for their suspicion does not rise to the level of reasonable suspicion. Thus, if the decision below is followed, some of the most effective law enforcement uses of these trained dogs would be eliminated.

The conflict here is exacerbated by the decision of the California Supreme Court in *People* v. *Mayberry*, 644 P.2d 810, 182 Cal. Rptr. 617 (1982). The court there specifically rejected the decision below and held that a dog sniff is not a search, explaining that "one who secrets illegal narcotics in his suitcase has no *protectible* privacy interest in those narcotics, nor any legitimate objection to an unintrusive method of detection which reacts *only* to such contraband." 644 P.2d at 813, 182 Cal. Rptr. at 620; emphasis in original.[10] The combination of *Mayberry* and the decision below places law enforcement officials in California—where there is a very substantial drug traffic problem—in a difficult position. Unless they decide to forego a valid law enforcement tool that has been approved by the highest court of the State, they will be unable to proceed with a federal prosecution and may

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sonable suspicion in several of the other contrary decisions (see App. A, *infra*, 15a n.20). Thus, it is clear that the decision below conflicts with decisions in most of the other courts of appeals.

[10] Several other state courts have also reached this result. See *People* v. *Price*, 54 N.Y.2d 557, 431 N.E.2d 267 (1981); *State* v. *Morrow*, 128 Ariz. 309, 312-313, 625 P.2d 898, 901-902 (1981); *State* v. *Wolohan*, 23 Wash. App. 813, 598 P.2d 421 (1979).

be subject to personal damage liability for their actions.[11] By the same token, many defendants who succeed in having evidence suppressed in federal court may find themselves facing a state prosecution based on the suppressed evidence.

Moreover, while the impact of the decision below in the Ninth Circuit alone will be severe, the effect of the decision cannot be so limited. Because of the mobility of air travelers, law enforcement officials outside the Ninth Circuit will have to take account of the decision below or else risk the suppression of vital evidence. In the instant case, for example, the challenged dog sniff took place in Florida, but respondent continued on to California and was arrested and tried in the Ninth Circuit; hence, the officers in Florida could not, as a practical matter, rely on the fact that the Fifth Circuit has held that reasonable suspicion is not required for a dog sniff of checked luggage (a holding also having precedential force in the Eleventh Circuit). Thus, it is important that the Court resolve the conflict created here and establish a uniform rule to govern the use of trained narcotics detection dogs nationwide.[12]

2. The decision below is unsupported by any accepted principles of Fourth Amendment jurisprudence. It is true, of course, that an individual has a privacy interest in the contents of his personal luggage (see App. A, *infra*, 6a-7a) and therefore that an exposure of those contents would be a search within the meaning of the Fourth Amendment. But a dog sniff does not expose those contents nor physically

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[11] While *Mayberry* was decided after the decision below, the conflict with *Mayberry* was brought to the attention of the court below in the government's petition for rehearing.

[12] Because the court of appeals remanded for further findings on the question of the existence of reasonable suspicion, it is possible that the government will prevail in this case on remand. In that event, however, the decision below will remain on the books and presumably will be binding precedent on district courts and law enforcement officials in the Ninth Circuit. Unlike a private party, our concern is not solely with the outcome of this particular case, but also with ascertainment of the proper rule to govern law enforcement activities throughout the Nation. Because of the confusion and problems described above that would result from that situation, it is our view that it is appropriate for the Court to grant certiorari here even though the case is at an interlocutory stage.

invade the luggage. Rather, a dog sniff simply involves an examination of the public airspace surrounding the luggage (which is being stored in a public place), and the suspicion that the luggage itself contains contraband is simply an inference drawn from the dog's reaction to the odor extant in that public airspace. When the odor escapes from the luggage into the air, the owner of the luggage has no right to exclude the public or the police from examining that odor. See, *e.g.*, *United States* v. *Waltzer*, *supra*, 682 F.2d at 373; *People* v. *Mayberry*, *supra*, 644 P.2d at 814, 182 Cal. Rptr. at 621.[13]

The court of appeals relied on *Katz* v. *United States*, 389 U.S. 347 (1967), which held that a warrantless bugging of a public telephone booth violated the Fourth Amendment, for its conclusion that "a canine's detection of [molecules of contraband in the air surrounding luggage] constitutes an intrusion into the owner's privacy interest in the contents of the [luggage]" (App. A, *infra*, 12a). *Katz* establishes, of course, that a surveillance technique may implicate Fourth Amendment concerns even if there is no physical invasion of a private area. But the rationale of *Katz* does not extend to the situation here. The Court explained there that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. * * * But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-352. The Court held that an individual who uses a telephone booth "is surely entitled to assume that the words he utters into the mouth piece will not be broadcast to the world" (*id.* at 352), *i.e.*, that an individual has a legitimate expectation of privacy in the contents of his conversations. Here, by contrast, an individual has no legitimate expectation of privacy in the odors that inevitably escape his luggage when he leaves it in a public place; those odors are

[13] Nor is there any constitutional violation simply because the odor is detectable by dogs and not humans; surveillance techniques that improve on the human senses do not necessarily implicate Fourth Amendment concerns. See, *e.g.*, *Smith* v. *Maryland*, 442 U.S. 735 (1979); *United States* v. *Lee*, 274 U.S. 559, 563 (1927).

not inherently private like the contents of telephone conversations and they have been "knowingly expose[d] to the public" (see *id.* at 351).

Moreover, as the court below acknowledged (App. A, *infra*, 14a), "[u]nlike wiretapping, which is almost inherently indiscriminate, the intruding canine nose is highly discriminate." A sniff test by a trained narcotics detection dog reveals no information other than the presence or absence of narcotics. Thus, the situation here is sharply distinguishable from that in *Katz* in terms of the individual's legitimate need for Fourth Amendment protection. The monitoring of a private conversation is obviously a substantial intrusion into an individual's privacy because it reveals the contents of his conversations, whether related to criminal activity or wholly innocent. But the dog sniff does not expose the contents of an individual's luggage. An individual who is not smuggling narcotics will suffer no intrusion whatsoever from a dog sniff. The only information the sniff test reveals is whether the luggage contains narcotics. While a drug smuggler obviously desires to keep that information private, that is not a privacy interest "that society is prepared to recognize as 'reasonable.'" *Rakas* v. *Illinois*, 439 U.S. 128, 144 n.12 (1978), quoting *Katz* v. *United States*, *supra*, 389 U.S. at 361 (Harlan, J., concurring). In short, it is untenable to maintain that, when an individual leaves his luggage in a public place such as an airport baggage terminal, the Fourth Amendment is violated if a dog trained to detect contraband walks close enough to the luggage to sniff it.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1982

## APPENDIX A

UNITED STATES COURT OF APPEALS,
NINTH CIRCUIT.

No. 80-1652

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE,

*v.*

JOHN CHRISTOPHER BEALE,
DEFENDANT-APPELLANT.

Argued and Submitted April 9, 1981.

Decided April 22, 1982.

Appeal from the United States District Court for the Southern District of California.

Before ELY, FLETCHER, and REINHARDT, Circuit Judges.

ELY, *Circuit Judge:*

This case, an appeal from a conviction of possession with intent to distribute and conspiracy to possess with intent to distribute a controlled substance, raises important constitutional issues relating to the application of Fourth Amendment rubric to the Government's use of trained canines to detect illegal substances not subject to perception by the unaided human senses. Because we hold that the use of trained canines in this case was improper absent a showing of "founded suspicion," we vacate and remand.

### FACTS

As appellant Beale was convicted in a bench trial on stipulated facts, we consider the facts, as stipulated and as adduced at the suppression hearing, to be undisputed. The

following rendition is gleaned from the trial "record," in the light most favorable to the Government. *See United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969).

On April 17, 1980, Detective Rick Berks of the Broward County Sheriff's Department was assigned to the airport detail at the Fort Lauderdale (Florida) Airport. This detail, which Detective Berks had performed for at least two years, is responsible for the "interdiction" or interception of narcotics contraband passing through the airport. Also on duty were Deputy Sheriff Larry Burk and a trained canine, "Nick."

Berks observed two male caucasians, subsequently identified as John Beale and Joseph Pulvano, exit a taxicab in front of the National Airlines terminal. Beale and Pulvano checked three pieces of luggage with a "skycap" and then entered the terminal together. Upon reaching a security checkpoint inside, they separated and obtained their seating assignments from the ticket counter independently. They both possessed first-class tickets to San Diego, with a change of planes in Houston. Berks ascertained that Beale's suitcase bore an identification tag indicating a New Jersey address. After separately departing from the ticket counter, Beale and Pulvano entered the National Airlines boarding area and sat down together.

Detective Berks, suspicious of the foregoing behavior,[1] approached Beale and Pulvano, identified himself, explained that they were not under arrest, and requested

[1] Berks, based on his expertise in airport-related narcotics cases, believed that the subjects' conduct in separating upon entering the airport terminal, obtaining separate seat assignments, and looking about furtively, and their destination—a known center of drug traffic—gave rise to an inference that they were drug couriers. *See generally United States v. Mendenhall*, 446 U.S. 544, 563–65, 100 S.Ct. 1870, 1878–80, 64 L.Ed.2d 497 (1980) (Powell, J., concurring). *But see Reid v. Georgia*, 448 U.S. 438, 440–41, 100 S.Ct. 2752, 2753–54, 65 L.Ed.2d 890 (1980) (per curiam). We express no view, however, whether these facts, later circumstances, and "rational inferences" therefrom rose to the level of "founded" or "articulable" suspicion. See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889 (1968); *United States v. Post*, 607 F.2d 847, 849–51 (9th Cir. 1979). This determination should be made in the first instance by the District Court on remand.

that they answer a few questions and produce some identification. Beale complied, producing his New Jersey driver's license. Pulvano, who appeared very nervous, stated that his identification was in his luggage, which he had just checked. Berks then asked the pair if they had ever been arrested. Pulvano said he had been arrested six years earlier on a narcotics charge. Berks thanked them for their cooperation and walked away. About five minutes later, Pulvano walked over to Berks and inquired if anything was wrong. Berks told Pulvano, who exhibited signs of abnormal anxiety—trembling hands, cracking voice, palpable agitation—that there was no problem at that time.

Berks proceeded to the baggage area, where he and Deputy Burk had "Nick" sniff or smell the vicinity of the suspects' bags. "Nick," an experienced and reliable drug detector, "alerted" on Beale's suitcase. As Beale and Pulvano had already boarded their flight to Houston, Berks contacted the Houston Police Department's airport detail and ran a computer check on the pair. Pulvano, the computer check revealed, had been arrested and convicted of possessing a large quantity of cocaine in an Atlanta airport approximately six months earlier.

Police officers in Houston kept the suspects and their luggage under surveillance as they changed planes in Houston. They deplaned separately and appeared as though they were not traveling together; they were the last two passengers to board the plane to San Diego. Agents in San Diego were alerted to the suspects' arrival.

When the plane arrived in San Diego, Beale and Pulvano, each carrying a shoulder bag, exited quickly and behaved warily. Beale did not go to the luggage area to claim his bags, but left the terminal and immediately attempted to board a taxicab. He was accosted by agents and, when asked about his luggage, asserted that he had lost the claim checks. While Pulvano was waiting inside the terminal at the baggage claim area, a United States Customs Service Officer and a trained canine "Duster" briefly intercepted the suspects' luggage. "Duster," an experienced and reliable narcotics detector, "alerted" on Beale's suitcase. When

Pulvano retrieved the bags—including Beale's—and started to leave the airport, he too was accosted. "Duster" later "alerted" on Beale's shoulder bag.

Based on a sworn affidavit containing this information, the officers obtained a search warrant for Beale's suitcase and shoulder bag. Approximately 961 grams of cocaine were discovered in the shoulder bag and approximately 137 grams of marijuana were discovered in the suitcase.

Beale's motion to suppress the evidence obtained in these searches was denied. On the foregoing stipulated facts Beale was convicted of possession with intent to distribute and conspiracy to possess with intent to distribute a controlled substance—cocaine—in violation of 21 U.S.C. §§ 841(a)(1), 846.

## ISSUES ON APPEAL

The only issue not subject to stipulation is the constitutional propriety of the principal police encounters with Beale and Pulvano, *i.e.*, their questioning in the Fort Lauderdale Airport, the "sniffing expedition" of their luggage in Fort Lauderdale, and their ultimate arrest and the search of their bags in San Diego.

## DISCUSSION

### I.

[1] Beale contends that the officer's initial approach and non-custodial questioning of him and his companion constituted a "seizure" or detention under the Fourth Amendment, requiring founded suspicion or probable cause. The District Court, however, concluded otherwise[2] and we agree. The suspects' mobility was not impaired; the situation was non-coercive; Berks did not request that they follow him or otherwise alter their destination, schedule, or location; the questions were routine and brief, and in an atmosphere not dominated by law enforcement personnel; and the suspects agreed to answer Berks' queries "in a spirit of apparent cooperation."[3] *See Sibron* v. *New York*,

[2] Reporter's Transcript at 73–74, 77.

392 U.S. 40, 63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968); *United States* v. *Fry*, 622 F.2d 1218, 1219–21 (5th Cir. 1980) (per curiam); *United States* v. *Elmore*, 595 F.2d 1036, 1041–42 (5th Cir. 1979), *cert. denied*, 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980); 3 W. La Fave, Search and Seizure: A Treatise on the Fourth Amendment 48–55 (1978).

Thus, we need not consider whether "founded" or "articulable" suspicion existed at that time. *Cf. United States* v. *Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Brown* v. *Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979); *Adams* v. *Williams*, 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972); *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *United States* v. *Corbin*, 662 F.2d 1066, 1068–71 (4th Cir. 1981).

## II.

Beale next contends that even if the initial encounter was not an unlawful seizure, the use of the trained canine "Nick" to "conduct a sniffing expedition" of his luggage in the baggage area of the Fort Lauderdale Airport constituted an illegal search. If the "sniffing expedition" were an illegal search, the Government would face a difficult, perhaps impossible, burden of showing that this did not taint or infect the ultimate search of Beale's luggage in San Diego. *See Wong Sun* v. *United States*, 371 U.S. 471, 484-88, 83 S.Ct. 407, 415-17, 9 L.Ed.2d 441 (1963).

Unfortunately, the parties have treated the "dog sniffing" issue in absolute terms. Beale argues, for instance, that the primary issue is whether the use of "Nick" to sniff his suitcase was a search requiring probable cause. The District Court, in the suppression hearing, held that the use of trained canines in this case was not a search and, hence, that no showing of suspicion was required.[4] Similarly, the Government argues on appeal that "it is well-estab-

[3] *Id.* at 8.

[4] *See id.* at 72 ("I think the present state of the law is that the dog search [sic] in Fort Lauderdale and here is not a search under the Fourth Amendment.").

lished that the use of trained dogs to sniff the exteriors of containers, including luggage, is not a search in violation of the Fourth Amendment." Brief of Appellee at 15.

Not only do these arguments oversimplify our holding in *United States* v. *Solis*, 536 F.2d 880, 882 (9th Cir. 1976), they also misapprehend the importance of a person's privacy interest in personal luggage. *See Arkansas* v. *Sanders*, 442 U.S. 753, 762, 764-65, 99 S.Ct. 2586, 2592, 2593, 61 L.Ed.2d 235 (1979); *United States* v. *Chadwick*, 433 U.S. 1, 11, 13, 97 S.Ct. 2476, 2483, 2484, 53 L.Ed.2d 538 (1977). *See also United States* v. *Allen*, 644 F.2d 749 (9th Cir. 1980); *United States* v. *Homberg*, 546 F.2d 1350, 1354-55 (9th Cir. 1976) (Ely, J., dissenting), *cert. denied*, 431 U.S. 940, 97 S.Ct. 2654, 53 L.Ed.2d 258 (1977); *United States* v. *Moore*, 483 F.2d 1361, 1363-64 (9th Cir. 1973).

Focusing on the precise physical nature of the canine sniffing obscures, we believe, the underlying Fourth Amendment interests. The Government emphasizes that only the "exterior of containers" were sniffed. Likewise, the Government relies on *United States* v. *Bronstein*, 521 F.2d 459, 461-63 (2nd Cir. 1975), *cert. denied*, 424 U.S. 918, 96 S.Ct. 1121, 47 L.Ed.2d 324 (1976), to counter Beale's argument that the use of trained canines is as intrusive under the Fourth Amendment as a magnetometer. *Bronstein*, however, like the earlier *United States* v. *Fulero*, 498 F.2d 748, 749 (D.C. Cir. 1974) (per curiam), is a pre-*Chadwick* case.

We seriously doubt whether the reasoning employed in *Bronstein* and *Fulero* is still sound. In *Bronstein* the Second Circuit stated that "[t]here can be no reasonable expectation of privacy when one transports baggage by plane, particularly today when the menace to public safety by the skyjacker and the passage of dangerous of hazardous freight compels continuing scrutiny of passengers and their impedimenta." 521 F.2d at 462. By applying *Chadwick* to transcend and limit the "automobile exception" to the warrant requirement in *Arkansas* v. *Sanders*, 442 U.S. at 763-65, 99 S.Ct. at 2592-93, the Supreme Court seems to

have rejected the *Bronstein* reasoning.[5] The D.C. Circuit's characterization as "frivolous" of the *Fulero* appellant's argument that a canine's sniffing of personal luggage was an unconstitutional intrusion into the lockers seems similarly flawed. 498 F.2d at 749.

Our analysis must begin with the premise that "the Fourth Amendment protects people, not places." *Katz* v. *United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). "[M]ore particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy." *United States* v. *Chadwick*, 433 U.S. at 7, 97 S.Ct at 2481. The protection of the Fourth

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[5] Moreover, it seems to us that *Bronstein's* equation of the menace of drug smuggling and use with the threat of skyjacking is logically flawed. Whatever danger drugs may pose to society, *see United States v. Mendenhall*, 446 U.S. at 561–62, 100 S.Ct. at 1881 (Powell, J., concurring), to our knowledge no one has ever hijacked or blown up an airplane with drug-type contraband. *Compare* United States v. Gumerlock, 590 F.2d 794, 796–800 (9th Cir.) (en banc), *cert. denied*, 441 U.S. 948, 99 S.Ct. 2173, 60 L.Ed.2d 1052 (1979), and *United States v. Davis*, 482 F.2d 893, 910–15 (9th Cir. 1973) (Fourth Amendment constraints on pre-boarding screening *security* searches of passengers and carry-on baggage at airports), *with United States v. Allen*, 644 F.2d at 750–52, *and United States v. Moore*, 483 F.2d at 1362-64 (Fourth Amendment constraints on *drug-motivated* searches or seizures of personal luggage "checked-through" airline or retained within airport terminal).

If the potentially "hazardous" or "dangerous" nature of a cargo is sufficient to abrogate travelers' reasonable expectation of privacy in containers being transported, the *Bronstein* approach would justify unrestricted roadblocks and vehicular searches, dragnet monitoring of domestic mail, and other unacceptable results. "*Terry* does not justify the wholesale 'frisking' of the general public in order to locate weapons and prevent future crimes." *United States v. Davis*, 482 F.2d at 908. "There is an obvious danger ... that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime." *Id.* at 909 (footnote omitted). The increasing use of dogs, in airports and elsewhere, to detect contraband exemplifies the "powerful hydraulic pressures" to "water down constitutional guarantees." *Terry v. Ohio*, 392 U.S. at 39, 88 S.Ct. at 1888 (Douglas, J., dissenting). We must be vigilant lest we succumb to those powerful pressures. *See United States v. Johnson*, 431 F.2d 441, 452 (5th Cir. 1970) (en banc) (Godbold, J., dissenting); *cf.* note 20 *infra*.

Amendment is invoked when the individual claiming it had a legitimate expectation of privacy in the invaded place. *Rakas* v. *Illinois*, 439 U.S. 128, 143, 99 S.Ct. 421, 430, 58 L.Ed.2d 387 (1978). The Supreme Court has recognized that "luggage is a common repository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." *Arkansas* v. *Sanders*, 442 U.S. at 762, 99 S.Ct. at 2592 (emphasis added). "[T]he critical factor relied on [in *Arkansas* v. *Sanders*] was the objective nature of the suitcase as personal luggage, *i.e.*, the inherent nature of the container itself rather than the behavior of its owner." *United States* v. *Cleary*, 656 F.2d 1302, 1304 (9th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3466 (U.S. Nov. 20, 1981) (No. 81-953).

Our inquiry, then, is whether the use of independent monitoring devices, such as drug-trained canines, to detect the presence of contraband within personal luggage[6] is an invasion of the owner's "inevitable" and "inherent" privacy interest in the contents therein.[7]

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[6] As we stated in *United States v. Cleary*, "the term 'personal luggage' encompasses those items commonly perceived as being designed for carrying and storing personal effects or papers and which have some sort of device to keep them closed." 656 F.2d at 1304–05 (footnote omitted).

[7] We need not decide whether the use of trained canines to detect the contents of other containers constitutes a violation of the Fourth Amendment. *See, e.g., United States v. Van Leeuwen*, 397 U.S. 249, 90 S.Ct. 1029, 25 L.Ed.2d 282 (1970) (parcels of mail); *United States v. Choate*, 576 F.2d 165, 174–80 (9th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 350, 58 L.Ed.2d 344 (1978) (same); *United States v. Mackey*, 626 F.2d 684, 687 (9th Cir. 1980) (contents of paper bag); *United States v. Venema*, 563 F.2d 1003, 1006–07 (10th Cir. 1977) (rental storage locker); *United States v. Race*, 529 F.2d 12, 13–14 (1st Cir. 1976) (air cargo freight in warehouse); *Doe v. Renfrow*, 475 F.Supp. 1012 (N.D. Ind. 1979), *modified per curiam*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022, 101 S.Ct. 3015, 69 L.Ed.2d 395 (1981) (students and lockers in public schools); *Bilbrey v. Brown*, 481 F.Supp. 26 (D.C.D.Or. 1979) (same); *State v. Rogers*, 43 N.C.App. 475, 259 S.E.2d 572 (1979) (safe deposit box). It bears emphasis, however, that if canine intrusions into these areas are permitted, it must be because the intrusion was reasonable or the expectation of privacy nonexistent, not because the dog's nose did not physically invade the protected area

In *United States* v. *Solis*, 536 F.2d 880 (9th Cir. 1976), we avoided characterizing the use of trained canines in terms of conventional detection devices. Instead, we applied a general reasonableness standard. *See id.* at 881-83. *Solis* noted, without drawing an analogy, that:

> Generally evidence acquired by unaided human senses from without a protected area is not considered an illegal invasion of privacy, but is usable under doctrines of plain view or open view or the equivalent. Odors so detected may furnish evidence of probable cause of "most persuasive character," *Johnson* v. *United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948) ....

*Id.* at 881. Looking at the totality of the circumstances, we held in *Solis* that Customs Officers' use of trained "drug dogs" to sniff a semi-trailer parked on the lot of a gas station was reasonable and not a prohibited Fourth Amendment search for the following reasons: "The agents had a founded suspicion based on the partial corroboration of the informant's statements"; the semi-trailer was parked in an area open to the public; "[t]here was no invasion of the 'curtilage'"; and "[t]he investigation was not indiscriminate." *Id.* at 882.

Beale's privacy interest in the contents of his suitcase was far greater than Solis' expectation of privacy in his semi-trailer. *See Arkansas* v. *Sanders*, 442 U.S. at 761-66, 99 S.Ct. at 2591-94; *United States* v. *Chadwick*, 433 U.S. at 11, 13, 97 S.Ct. at 2483, 2484;[8] *Cardwell* v. *Lewis*, 417 U.S. 583, 589-92, 94 S.Ct. 2464, 2468-70, 41 L.Ed.2d 325 (1974); *Carroll* v. *United States*, 267 U.S. 132, 153, 45

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in a trespassory sense. *See Katz v. United States*, 389 U.S. at 352–53, 88 S.Ct. at 510–11; note 20 *infra* & accompanying text.

Finally, irrespective of whether canine-sniffing of luggage at a port of entry or international border is a Fourth Amendment intrusion, there is ample authority that routine searches and inspections conducted by Customs officials at the border are *per se* reasonable. This includes the inspection of international letter mail. *United States v. Ramsey*, 431 U.S. 606, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977); see *United States v. Dubrofsky*, 581 F.2d 208, 211 (9th Cir. 1978).

[8] "[A] person's expectations of privacy in personal luggage are substantially greater than in an automobile." 433 U.S. at 13.

S.Ct. 280, 285, 69 L.Ed. 543 (1925). In fact, the Supreme Court has elevated personal luggage to the Fourth Amendment status accorded private residences:

> No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions [by locking them in a piece of luggage] is due the protection of the Fourth Amendment Warrant Clause.

*Chadwick*, 433 U.S. at 11, 97 S.Ct. at 2483.

> Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to expect that the contents of his luggage will not, without his consent, be exposed on demand of the police.

*Arkansas* v. *Sanders*, 442 U.S. at 767, 99 S.Ct. at 2594 (Burger, C. J., concurring).

This distinction between *Solis* and the present case, while relevant, is not dispositive. Had Detective Berks, utilizing only his own natural senses, been able to detect the odor of controlled substances emanating from Beale's suitcase, this would not have been a Fourth Amendment intrusion. *See United States* v. *Solis*, 536 F.2d at 881. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz* v. *United States*, 389 U.S. at 351, 88 S.Ct. at 511.[9]

The superficially appealing analogy between the use of a canine's acute sense of smell, and, for instance, mechanical

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[9] *Compare Katz v. United States*, 389 U.S. at 352, 88 S.Ct. at 512 (electronic eavesdropping device invades the reasonable expectation of privacy one has in a phone booth), *with United States v. McLeod*, 493 F.2d 1186 (7th Cir. 1974) (when telephone caller is aware of nearby third party, who overhears caller's conversation, no reasonable expectation of privacy is violated). *See generally, United States v. White*, 401 U.S. 745, 748–54, 91 S.Ct. 1122, 1124–27, 28 L.Ed.2d 453 (1971).

enhancement devices such as flashlights[10] or binoculars[11] is, upon reflection, inapt. A trained canine's sense of smell is more than eight times as sensitive as a human's. *See United States* v. *Solis*, 536 F.2d at 881. Moreover, the dog does not amplify its handler's perception; it is an independent detection device, alerting the officer to information he would have been utterly unable to detect with his own senses. Nick's nose did not enhance Detective Berks' senses; it replaced them.[12] *Accord*, *United States* v. *Bron-*

[10] Under particular circumstances, we have approved certain limited use of such devices. *See, e.g., United States v. Hood*, 493 F.2d 677, 680 (9th Cir.), *cert. denied*, 419 U.S. 852, 95 S.Ct. 94, 42 L.Ed.2d 84 (1974); *United States v. Walling*, 486 F.2d 229, 236 (9th Cir, 1973), *cert. denied*, 415 U.S. 923, 94 S.Ct. 1427, 39 L.Ed.2d 479 (1974); *United States v. Marin*, 444 F.2d 86, 87 (9th Cir. 1971) (citing *Marshall v. United States*, 422 F.2d 185 (5th Cir. 1970)) (use of flashlight neither validates otherwise unlawful search nor invalidates otherwise lawful search). In these cases, the sense-enhancing devices merely enabled the officers to perceive at night that which they could normally have perceived, unaided, during the day.

[11] In *United States v. Allen*, 633 F.2d 1282, 1290 (9th Cir. 1980), *as amended*, ___ (9th Cir. April 16, 1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 133, 70 L.Ed.2d 112 (1981), we held that the use of binoculars from a hill observation site violated no reasonable expectation of privacy. In that case, however, we also validated surveillance from a hill accomplished with the naked eye. *Id.* No valid analogy, however, can be drawn between *Allen* and the case at bar. Our decision in *Allen* was premised on the necessarily reduced expectation of privacy held by the defendant because of the location of the area searched. As we stated:

> The Allen Ranch is virtually on the United States sea-coast border (citations omitted), and Coast Guard helicopters routinely traversed the nearby airspace for several reasons, including law enforcement. The residents of the Allen Ranch would, no doubt, have been aware of these routine flights and any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well-known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sense-enhancing devices.
>
> As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's air-borne telephotographic scrutiny of the objects observed here, large scale modifications of the Allen Ranch landscape and barn.

[12] Since *Katz*, *supra*, the use of independent detection devices such as magnetometers and x-ray scans has uniformly been held to constitute a search. *See, e.g., United States v. Henry*, 615 F.2d 1223, 1227

*stein*, 521 F.2d at 464 (Mansfield, J., concurring); Comment, *United States* v. *Solis: Have the Government's Supersniffers Come Down With a Case of Constitutional Nasal Congestion?*, 13 San Diego L.Rev. 410, 423 (1976). Thus, the use of trained canines to monitor the contents of personal luggage cannot be analyzed as a variant of human plain view or plain smell. *Cf. United States* v. *Leazar*, 460 F.2d 982, 983-85 (9th Cir. 1972) (police officer's olfactory detection of marijuana odor in car created probable cause for arrest). *Accord, United States* v. *Johnston*, 497 F.2d 397, 398 (9th Cir. 1974); *United States* v. *Barron*, 472 F.2d 1215, 1217 (9th Cir.) (per curiam), *cert. denied*, 413 U.S. 920, 93 S.Ct. 3063, 37 L.Ed.2d 1041 (1973).

The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest in the contents of the container. *See Hernandez* v. *United States*, 353 F.2d 624, 626 (9th Cir. 1965), *cert. denied*, 384 U.S. 1008, 86 S.Ct. 1972, 16 L.Ed.2d 1021 (1966). The "trepassory" or "physical penetration" mode of Fourth Amendment analysis was abandoned in *Katz* v. *United States* in favor of a normative "expectation of privacy" standard. 389 U.S. at 352-53, 88 S.Ct. at 511-12; *see Smith* v. *Maryland*, 442 U.S. 735, 740-41 n.5, 99 S.Ct. 2577, 2580 n.5, 61 L.Ed.2d 220 (1979); *United States* v. *Taborda*, 635 F.2d 131, 136-39 (2nd Cir. 1980); *United States* v. *Davis*, 482 F.2d 893, 905 (9th Cir. 1973).

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(9th Cir. 1980) (x-ray scan); *United States v. Albarado*, 495 F.2d 799 (2nd Cir. 1974) (magnetometer). While the use of independent electronic or mechanical detection devices constitutes a search, the corollary is not necessarily true in the case of sense-enhancing devices. Generally, we have limited our exemption of the use of sense-enhancing devices from the strictures of the Fourth Amendment to cases in which ordinary, commercially available devices, which citizens might expect members of the general public as well as the law enforcement community to possess, are employed *and* their use occurs in a location from which the ordinary citizens might otherwise observe the property or activity. Clearly, the use of some sense-enhancing devices may constitute a search. *See, e.g., Katz*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576.

To paraphrase *Katz*, what Beale sought to exclude when he locked his suitcase was not only the intruding human eye—it was also the intruding canine nose. One who reposes his personal effects, including contraband, in a locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.[13] *See* 389 U.S. at 352, 88 S.Ct. at 512. *Cf. Stanley* v. *Georgia*, 394 U.S. 557, 565, 89 S.Ct. 1243, 1248, 22 L.Ed.2d 542 (1969) ("Whatever may be the justifications for other statutes regulating [, *inter alia*, the sale and purchase of] obscenity, we do not think they reach into the privacy of one's own home."); *id.* at 571-72, 89 S.Ct. at 1251 (Stewart, J., concurring) (reaching same conclusion on Fourth Amendment grounds).

[2] However, we do not agree with Beale that the use of drug-detecting canines is identical to the use of a magnetometer, x-ray machine, or other electronic or mechanical surveillance device, invoking the full rigors of the Fourth Amendment rubric. While x-ray scans and the use of magnetometers are "searches" subject to the full requirements of the Fourth Amendment, *see United States* v. *Henry*, 615 F.2d 1223, 1227-28 (9th Cir. 1980), we find the use of drug dogs sufficiently distinct and less intrusive to warrant a different treatment.

Drug-detecting canines may be "utilized with minimal invasion of privacy." *United States* v. *Solis*, 536 F.2d at 882. "[Their use] is distinguishable from all other search activities in that there is no risk that an innocent person's privacy will be intruded upon." 1 W. La Fave, *supra*, at 387.

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[13] We agree with the Second Circuit that "analysis of the constitutional protection to be accorded to privacy expectations is [not] significantly aided by reference to the nature of the conduct involved." *United States v. Taborda*, 635 F.2d at 138 n.10.

> A person in his home has no greater, nor more reasonable, expectation that he will be observed by his neighbor when his conduct is criminal than when it is innocent. What varies with the nature of the activity is not the likelihood, but rather the consequences, of its being observed.

*Id.* at 139 n.10. The fact that trained canines detect *only* contraband diminishes, but does not obliterate, the nature of the intrusion. A graduated Fourth Amendment approach may not be appropriate with other forms of detection technology.

Unlike wiretapping, which is almost inherently indiscriminate, the intruding canine nose is highly discriminate. *See Peebles, The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on* Katz *and Dogs*, 11 Ga.L.Rev. 75, 89 (1976). In contrast to "dragnet" detection measures, which discern all conversations, all metal objects, or all observed activity, the canine detects *only contraband*. "Any intrusion is minimal because the only information gleaned from the [canine] 'examination' is whether contraband is present. If an innocent person's suitcase were 'examined' by the canine, the handler would learn only that marijuana was not present." Note, *Constitutional Limitations on the Use of Canines to Detect Evidence of Crime*, 44 Fordham L.Rev. 973, 987 (1976) (footnote omitted). Properly trained canines are extremely reliable and any mistake is one of omission, favoring the suspect. When a dog is directed to approach luggage which does not contain the suspected contraband, the animal will not "alert," obviating the possibility of annoyance, inconvenience, harassment, and humiliation associated with unproductive surveillance of other sorts. 1 W. La Fave, *supra*, at 288.[14]

[3] Therefore, we hold—consistent with the unarticulated reasoning of *United States* v. *Solis*;[15] *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980);[16] *United States* v.

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[14] Our decision is expressly premised on this concept of canine reliability and on the fact that the Government must establish the dog's reliability as part of its showing to support the issuance of a warrant or a finding of probable cause. Should either of these premises prove inaccurate, the use of dogs to sniff luggage would not be condoned by the court unless all the normal prerequisites to an ordinary search were complied with.

[15] "The agents had a founded suspicion [that the semi-trailer contained marijuana]. Calling upon the dogs for further corroboration . . . as a basis for application to a magistrate for a warrant to enter the vehicle was a reasonable course of action on the part of the agents." 536 F.2d at 882.

[16] [Suspicious circumstances] coupled with the agents' previous observation of defendants and the information from the Florida deputy sheriff were not enough to establish probable cause, either for an arrest or for a search of defendants' luggage, but were certainly enough to give the agents reasonable suspicion to believe that the suitcases contained contraband.

*Bronstein;* [17] and *United States* v. *Fulero*[18]—that the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage[19] *is* a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's "founded" or "articulable" suspicion rather than probable cause.[20] *See State* v. *Wolohan*, 23 Wash.App. 813, 598 P.2d 421 (1979) (McInturff, J., dissenting).

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626 F.2d at 25. "[T]here is no substantial difference between the doctrine of 'founded suspicion' . . . and the 'reasonable suspicion' test . . ." *United States v. Rocha-Lopez*, 527 F.2d 476, 477 (9th Cir. 1975), *cert. denied*, 425 U.S. 977, 96 S.Ct. 2181, 48 L.Ed.2d 802 (1976).

[17] "In view of the tip received from the airline-employee informants previously found to be reliable by the West Coast DEA agent . . ., there was ample cause for the agents to pursue the lead and to place under surveillance the fully described passengers and their luggage." 521 F.2d at 461. "I would strictly limit [canine sniffing] to cases where there are grounds for [reasonable suspicion that the baggage contains contraband], similar to or stronger than that present here, and would not permit a wholesale examination of all baggage in the hope that a crime might be detected." *Id.* at 465 (Mansfield, J., concurring).

[18] Prior to using the drug-detecting dogs, the police officer in *Fulero* had reasonable suspicion, based on the totality of circumstances, that the footlockers contained contraband. See 498 F.2d at 748–49. *See also People v. Lester*, 101 Cal. App.3d 613, 161 Cal. Rptr. 703, *cert. denied*, 449 U.S. 919, 101 S.Ct. 316, 66 L.Ed.2d 146 (1980); *People v. Furman*, 30 Cal. App.3d 454, 106 Cal. Rptr. 366 (1973).

[19] In the present case, the luggage sniffed was located in an airport baggage room removed from the vicinity of its owners and other travelers. There was no possibility that the dog would alert to contraband being carried on a person. Thus we do not confront the constitutional problem which would be presented if law enforcement officers sought to use highly trained canines to sniff luggage in close proximity to people. *See* last part of note 20, *infra*, and *Solis*, 536 F.2d at 883 ("There was no embarrassment to or search of the person.").

[20] To the extent that *United States v. Burns*, 624 F.2d 95, 101 (10th Cir.), *cert. denied*, 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980); *United States v. Sullivan*, 625 F.2d 9, 12–13 (4th Cir. 1980), *cert. denied*, 450 U.S. 923, 101 S.Ct. 1374, 67 L.Ed.2d 352 (1981); and *United States v. Goldstein*, 635 F.2d 356, 360–62 (5th Cir.), *cert. denied*, 452 U.S. 962, 101 S.Ct. 3111, 69 L.Ed.2d 972 (1981), depart from this unstated rationale, we decline to follow them. As stated earlier in this opinion, after *Katz*, *Chadwick*, and *Arkansas v. Sanders*, it is not tenable to assert that "[t]here can be no reasonable expectation of privacy when any passenger's bags may be subjected to

[4] Because the District Court apparently misconstrued *Solis* as holding that canine sniffing is not a Fourth Amendment intrusion *at all*, it did not make any factual or legal determination with respect to the Fort Lauderdale officers' quantum of suspicion. *See* Reporter's Transcript at 72-78. Rather than make this finding *de novo*, we prefer to remand the case to the District Court to make the necessary determinations. If the District Court finds that the Fort Lauderdale "sniffing expedition" was supported by articulable, founded suspicion, then the District Court would be correct in its prior ruling that "probable cause for [Beale's]

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close scrutiny for the protection of public safety," *Sullivan*, 625 F.2d at 13, or that "the olfactory activities of a trained police dog legitimately on the premises do not constitute a search." *Burns*, 624 F.2d at 101. Nor do we agree with either the formulation or the conclusion that "the passenger's reasonable expectation of privacy does not extend to the airspace surrounding [his] luggage." *Goldstein*, 635 F.2d at 361. See note 5 *supra* & accompanying text; text accompanying notes 8–13 *supra*.

We are mindful that Professor Amsterdam might view our holding as a "sliding scale" application of Fourth Amendment principles that may gradually dilute its protections in critical respects. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L. Rev. 349, 393 (1974). We do not intend any dilution. The rule we adopt here sets forth a minimum level of Fourth Amendment "entitlement." In situations less pervasively regulated than airports, it may be that a person's reasonable expectation of privacy in his luggage is greater, warranting a correspondingly more protective analysis of the "intrusion" issue. And it goes without saying that the alternative to random checkpoint stops cited in *Delaware v. Prouse*, *i.e.*, "[q]uestioning . . . all oncoming traffic at roadblock-type stops," 440 U.S. 648 at 663, 99 S.Ct. 1391 at 1401, 59 L.Ed.2d 660, is totally unpalatable in the canine sniffing context. Nothing would invoke the spectre of a totalitarian police state as much as the indiscriminate, blanket use of trained dogs at roadblocks, airports, and train stations. *See generally Terry v. Ohio*, 392 U.S. 1, 38–39, 88 S.Ct. 1868, 1888, 20 L.Ed.2d 889 (1968) (Douglas, J., dissenting); *United States v. Bronstein*, 521 F.2d at 465 (Mansfield, J., concurring); 1 W.La Fave, *supra*, at 286. Similarly, the use of dogs to sniff people, rather than objects, is highly intrusive and is normally inconsistent with the concepts embodied in our Constitution. We would not preclude, however, the use of a trained canine who sniffs from a distance as an alternative where a more intrusive strip search or search of the body cavities is justified.

arrest was established by the narcotic dog's actions in Florida, followed up by the narcotic dog alerting again in San Diego." *Id.* at 77.

If, however, the District Court finds that the Fort Lauderdale intrusion was based on a constitutionally deficient level of suspicion, it will have to revise its probable cause determination concerning Beale's arrest and the issuance of the search warrant in San Diego, excluding evidence tainted by the Florida dog sniffing.[21]

The judgment of conviction is therefore VACATED AND REMANDED, WITH INSTRUCTIONS.

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[21] *See Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *United States v. Cella*, 568 F.2d 1266, 1284–87 (9th Cir. 1977); note 1 *supra*.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-1652

D.C. No. CR 80-277-LCN

Filed July 21, 1982

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

JOHN CHRISTOPHER BEALE, DEFENDANT-APPELLANT.

---

**ORDER**

Amending Opinion

Before: ELY, FLETCHER, and REINHARDT, Circuit Judges

The Opinion, filed April 22, 1982, in the above-entitled case shall be amended as follows:

1. At 674 F.2d 1327, 1334 (9th Cir. 1982) [14a], second column, line 35, insert "normally" after the words "any mistake is".

2. At page 1334 [14a], second column, line 38, insert "ordinarily" after the words "the animal will".

3. At page 1334 [13a], footnote 13, second column, line 4, insert "may" after "that trained canines".

4. At page 1335 [14a], footnote 14, add a new paragraph to the footnote as follows:

> It must be emphasized that dogs, like humans and machines, are not infallible, and that, notwithstanding the optimistic views of some commentators, on occasion a narcotics dog may err. Thus, the mere fact that a dog alerts to a suitcase, even when there is founded suspicion to allow the dog to sniff, is not necessarily ground for probable cause to open and inspect it. Knowledge that the dog is reliable is central to establishing the necessary probable cause.

## APPENDIX C

## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-1652

D.C. No. CR 80-277-LCN

Filed Aug. 5, 1982

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

*v.*

JOHN CHRISTOPHER BEALE, DEFENDANT-APPELLANT.

### ORDER

Before: ELY, FLETCHER, and REINHARDT, Circuit Judges

The judges constituting the panel originally concerned with the subject case (Ely, Fletcher, Reinhardt) have voted unanimously to deny the Petition for Rehearing. Judges Fletcher and Reinhardt have voted to reject the suggestion for en banc rehearing, and Judge Ely has recommended that such suggestion be rejected.

The full court having been advised of the suggestion for en banc rehearing, and a judge in active service having requested that a vote be taken on the suggestion on en banc rehearing, such a vote has been taken. Fed. R. App. P. 35(b). The suggestion for en banc rehearing was not adopted by a majority of the court's judges in active service.

Accordingly, the Petition for Rehearing is denied, and the suggestion for en banc rehearing is rejected.

Office-Supreme Court, U.S.
FILED
FEB 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-674

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

JOHN CHRISTOPHER BEALE,
*Respondent.*

---

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Whether the Fourth Amendment requires that law enforcement officials have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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**No. 82-674**

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UNITED STATES OF AMERICA,
*Petitioner,*

v.

JOHN CHRISTOPHER BEALE,
*Respondent.*

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent John Christopher Beale, by and through his attorneys of record, oppose the Government's Petition for a Writ of Certiorari and will represent that this cause need not be reviewed by this Court.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 1327 and Respondent hereby incorporates by reference Petitioner's Appendix (Pet. App. A, 1a-17a).[1]

[1]The opinion as reported does not contain the modifications made by the court of appeals in its July 21, 1982, amendment to the decision. See Pet. App. B, 18a.

## JURISDICTION

The judgment of the Court of Appeals (Pet. App. A, 17a) was entered on April 22, 1982. A petition for rehearing was denied on August 5, 1982 (Pet. App. C, 19a). On September 20, 1982, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including October 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following the denial of his suppression motion, respondent was convicted at a bench trial on stipulated facts in the United States District Court for the Southern District of California of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846, and of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Pet. App. A, 1a, 4a). He was sentenced to concurrent terms of 30 months' imprisonment on each count, to be followed by a seven-year special parole term. The Court of Appeals vacated the conviction on the ground that the district court had erred in denying the suppression motion.

1. The evidence adduced at a suppression hearing showed that on April 17, 1980, Detective Rick Berks and Deputy Larry Burk of the Broward County, Florida, Sheriff's Department were assigned to the airport narcotics interdiction detail at the Fort Lauderdale Airport.[2] While watching passengers in the vicinity of the National Airlines terminal, Detective Berks observed Respondent and codefendant Joseph Pulvano[3] leave a taxicab, check three

[2]Respondent's trial consisted of the filing of a stipulation ("Stip.") by the parties to certain facts developed during the suppression hearing, which was made a part of the trial record, and the entry of a guilty verdict by the court on the basis of the stipulated facts (Tr. 80-82).

[3]Pulvano pled guilty to a conspiracy charge following the denial of his suppression motion (Tr. 80) and was not a party on appeal.

pieces of luggage including a large maroon suitcase, and enter the terminal together. Upon reaching a security checkpoint inside, the two men separated and independently approached the ticket counter, but then sat together in the boarding area. After observing this behavior, Detective Berks determined that the two men had obtained separate seating assignments on a National Airlines flight to San Diego, California, with a change of planes in Houston, Texas. Detective Berks also examined the labels on the Defendant's luggage and noticed that Pulvano was watching him while he examined the bags (Pet. App. A, 2a; Tr. 6-7; Stip. 2-3).

Detective Berks then approached the two men, identified himself, and asked whether they objected to answering a few questions. When they responded that they did not, the officer explained that they were not under arrest, but asked to see their identification and inquired whether either of them had ever been arrested. Petitioner displayed a New Jersey driver's license; Pulvano, who appeared extremely nervous, stated that his identification was in his suitcase and that he had been arrested on a narcotics charge six years earlier. Detective Berks then thanked them for their cooperation and walked to the other side of the boarding area. Approximately five minutes later, Pulvano approached Detective Berks and inquired whether anything was wrong. The officer responded that there was no problem at that time (Pet. App. A, 2a-3a; Tr. 8-10; Stip. 3).

While Detective Berks was speaking with Respondent and Pulvano, Officer Burk obtained a trained narcotics detection dog. After Detective Berks concluded his conversation with the Defendants, the officers went to the baggage loading ramp adjacent to the National Airlines ticket counter, which contained the baggage that Respon-

dent and Pulvano had checked. The dog immediately "alerted" to Respondent's large maroon suitcase, indicating that it contained narcotics (Pet. App. A, 3a; Tr. 10-11; Stip. 3).

The officers then requested a computer check on the two men, which revealed that Pulvano had been arrested and convicted about six months before for possession of cocaine. Detective Berks then telephoned law enforcement officials at the airports in Houston, Texas, and San Diego, California, notifying them of the events that had transpired (Pet. App. A, 3a; Tr. 12-13; Stip. 3-4). Police officers in Houston kept Respondent and Pulvano under surveillance as they changed planes there, observing that the two men acted as though they were traveling separately (Pet. App. A, 3a; Tr. 14; Stip. 4).

When the two men deplaned in San Diego they were again observed by law enforcement officers, who noted that they did not appear to be traveling together and behaved as though they feared surveillance. As the reached the front of the terminal, Pulvano stopped at a telephone; Respondent walked directly to a taxi without making any effort to retrieve his luggage (Pet. App. A, 3a; Tr. 49-50; Stip. 5). Police officers then approached Respondent and asked him about his luggage. In response, he stated falsely that he was traveling alone and that he had lost his claim ticket. There upon the officers advised him that he was under arrest and escorted him back to the terminal (Pet. App. A, 3a; Tr. 50-53; Stip. 5-6).

While Respondent and Pulvano were under surveillance, other officers took a trained narcotics detection dog to the baggage claim area, and this dog also alerted to Respondent's large maroon suitcase (Pet. App. A, 3a; Tr. 29; Stip. 6-7). Shortly thereafter, the officers observed

Pulvano retrieve the bags from the luggage carousel and proceed toward the nearest exit. The officers then stopped him and escorted him to the airport Narcotic Task Force Office where he consented to a search of all the bags except the maroon suitcase (Pet. App. 4a; Tr. 30-32; Stip. 7). Subsequently, when Respondent arrived at the Narcotics Task Force Office, the dog also alerted to the shoulder bag that Respondent had been carrying (Pet. App. A, 4a; Tr. 63-64; Stip. 8).

Based on this information, the police obtained a search warrant from a state court judge for the two suitcases to which the dog had alerted. The ensuing search revealed that Respondent's shoulder bag contained approximately one kilogram of cocaine and that the maroon suitcase contained approximately 137 grams of marijuana (pet. App. A, 4a; Tr. 35; Stip. 8).

2. The district court denied the motions of Respondent and Pulvano to suppress the evidence obtained as the result of these searches (Tr. 7278). The Court rejected the contention that probable cause was required for the police at the Fort Lauderdale Airport either to remove the bags from the airline luggage rack or to expose them to a narcotics detection dog, explaining that "the present state of the law is that the dog search in Fort Lauderdale and here is not a search under the Fourth Amendment" (Pet. App. A, 5a n.4; Tr. 72).

3. The Court of Appeals vacated the conviction and remanded (Pet. App. A, 1a-17a). The court held that "the use of a canine's keen sense of smell to detect the presence of contraband within personal luggage is a Fourth Amendment intrusion, albeit a limited one that may be conducted without a warrant and which may be based on an officer's 'founded' or 'articulable' suspicion rather than probable

cause" (id. at 15a; footnote omitted; emphasis deleted).[4] Accordingly, the court of appeals remanded to the district court for a determination whether the officers who exposed Respondent's luggage to a trained dog at the Fort Lauderdale airport possessed the requisite suspicion that it contained contraband (id. at 16a-17a).

The Court explained that the Fourth Amendment "protects people from unreasonable government intrusions into their legitimate expectations of privacy" (Pet. App. A, 7a, quoting *United States v. Chadwick*, 433 U.S. 1, 7 (1977)). The use of a trained dog to detect contraband within personal luggage, the Court stated, violated such an expectation of privacy. The Court acknowledged that if the odor of drugs emanating from a suitcase were detectable by the human nose, there would be no Fourth Amendment intrusion (Pet. App. A, 10a), but it held that the use of a trained dog did constitute such an intrusion. The Court explained (id. at 12a-13a; footnote omitted):

> The molecules of contraband emanating from the interior of luggage are so subtle and incapable of human perception that a canine's detection of them constitutes an intrusion into the owner's privacy interest in the contents of the container.***
>
> To Paraphrase Katz (v. United States, 389 U.S. 347 (1967)), what (Respondent) sought to exclude when he locked his suitcase was not only the intruding human eye - it was also the intruding canine nose. One who reposes his per-

[4]The Court rejected Respondent's contention that the officer's approach to him in Fort Lauderdale violated the Fourth Amendment. The Court held that the situation was "non-coercive" and that Respondent and Pulvano answered the questions " 'in a spirit of apparent cooperation' "; hence, the encounter was not a "seizure" under the Fourth Amendment. See Pet. App. A, 4a-5a.

> sonal effects, including contraband, in a locked suitcase is surely entitled to assume that a trained canine will not broadcast its incriminating contents to the authorities.

Hence, the Court concluded that the Fourth Amendment requires a threshold of reasonable suspicion[5] before law enforcement officers may employ a dog to determine whether or not a suitcase contains contraband (id. at 15a).[6]

## SUMMARY OF ARGUMENT

Fourth Amendment law recognizes a legitimate expectation of privacy in a person's luggage. Under such protection law enforcement officials are required to have a reasonable suspicion that luggage contains contraband before exposing it to a sniff test by a trained narcotics detection dog.

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[5]The Court of Appeals rejected Respondent's contention that dog sniffs are indistinguishable from the use of magnetometer or an x-ray machine and hence unlawful in the absence of probable cause. Finding that the use of narcotics detection dogs is less intrusive than such techniques because a dog detects only the presence or absence of contraband, the Court heid that a less rigorous standard than probable cause was appropriate. See Pet. App. A, 13a-14a.

[6]The Court of Appeals recognized that its decision was contrary to decisions in several other courts of appeals (Pet. App. A, 6a-7a, 15a n.20). The Court stated that, in its view, those decisions holding dog sniff tests of luggage to be permissible in the absence of reasonable suspicion were no longer sound in light of this Court's decision in *United States v. Chadwick, supra,* which recognized the importance of an individual's privacy interest in personal luggage (Pet. App. A, 6a-8a, 10a). With respect to those contrary court of appeals decisions rendered subsequent to *Chadwick,* the court below announced that it "decline(d) to follow them" (Pet. App. A, at 15a, n.20).

## ARGUMENT

It is well settled that the essence of a search is the intrusion into an area which the owner or possessor is entitled to enjoy as private. *United States v. Bronstein,* 521 F.2d 459 (2nd Cir. 1975), *cert. denied,* 424 U.S. 918, 96 S.Ct. 1121, 47 L. Ed. 2d, 324 (1976). Clearly there cannot be such intrusion where a human being can with his own senses and without physical investigation, ascertain the contents of a particular area. However, where one must rely on the use of certain aids or instruments such as binoculars, flashlights, hidden microphones, or even marijuana-sniffing dogs, the answer is not as clear.

In wrestling with Fourth Amendment considerations, courts have drawn distinctions between the use of certain "sense - enhancing" instruments that aid in the detection of contraband, and independent monitoring devices, such as drug-trained canines. See *United States v. Lee,* 274 U.S. 559, 563, 47 S.Ct. 746, 71 L. Ed. 1202 (1927). In conjunction with this is the level of privacy associated with the area that is searched. *United States v. Chadwick,* 433 U.S., 97 S. Ct. 2481 (1977). The necessary inquiry in the instant case, then, relates to the use of drug-trained canines for the explicit purpose of detecting contraband within personal luggage.

The Supreme Court has indeed recognized that "luggage is a common repository for one's personal effects, and therefore is *inevitably* associated with the expectation of privacy." *Arkansas v. Sanders,* 442 U.S. 753, 762, 99 S. Ct. 2586, 2592, 61 L. Ed. 2d 235 (1979) *(emphasis added).* "[T]he critical factor relied on *(in Arkansas v. Sanders,)* was the objective nature of the suitcase as personal luggage, i.e., the inherent nature of the container itself rather than the behavior of its owner." *United States v. Cleary,*

656 F.2d 1302, 1304 (9th Cir. 1981), *petition for cert. filed,* 50 U.S.L.W. 3466 (U.S. Nov. 20, 1981) (No. 81-953).

Under our fact situation, the obvious question presented is whether the detection of the odoriferous drug by the use of the sensitive and schooled canine senses employed, constitutes an invasion of Respondent's "inevitable" and "inherent" privacy interest in the contents of his luggage. Petitioner would argue that a canine's detection of molecules of contraband in the air surrounding Respondent's luggage does not constitute an intrusion into his privacy interest in the content of said luggage, since there is no physical invasion of a private area.

This Court has previously held, however, that a surveillance technique may implicate the Fourth Amendment concerns even if there is no physical invasion of a private area. *Katz v. United States,* 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). In *Katz* the warrantless bugging of a public telephone booth was found to violate the Fourth Amendment and the Court explained there that:

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.*** But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

389 U.S. at 351-352. By way of analogy, in drawing upon *Katz,* the court of appeals recognized Respondent's legitimate expectation of privacy not only in the contents, but in the odors emanated as well. Thus, "the use of sophisticated modern mechanical or electronic devices and the frightening implications of their possible development have led to abandonment of the test of physical trespass within the protected area and broadening of protection to

cover a 'reasonable expectation of privacy' " *Katz, supra* at 360.

In delivering his concurring opinion in the *United States v. Bronstein, supra* at 464, Circuit Judge Mansfield stated:

> [T]he police have been permitted to enhance or magnify the human senses with the aid of instruments such as binoculars or flashlights, *** (b)ut that is not the case here where the nose being put into other's business was clearly an intrusion.

The police agents here did not smell or see any contraband, nor were their senses enhanced. The only indication that marijuana was present was the action of the dog. Their own senses were replaced by the more sensitive nose of the dog in the same manner that a police officer's ears are replaced by hidden microphone in areas where he cannot otherwise hear because of the inaudibility of the sounds. The illegality of the latter practice in the absence of a search warrant for special circumstances has long be established. *Katz, supra.* In his opinion, Judge Mansfield concluded there was "no legally significant difference between the use of any X-ray machine or magnetometer to invade a closed area in order to detect the presence of a metal pistol or knife," which has been held to be a search, *United States v. Alvarado,* 495 F.2d 799 (2d Cir. 1974), "and the use of dog to sniff for marijuana inside a private bag. Each is a non-human means of detecting the contents of a closed area without physically entering into it." *Bronstein, supra* at 464. Even though neither intrusion is particularly offensive, the fact remains that each detects hidden objects without actual entry and without the enhancement of human senses. "The fact that canine's search is more particularized and discriminate than that of the magnetometer is not a basis for a legal distinction. Judge Mansfield states that:

> [t]he important factor is not the relative accuracy of the sensing device but the fact of the intrusion into a closed area otherwise hidden from human view, which is the hallmark of any search.
>
> If, as we have held, examination of carry-on luggage and individual passengers by a magnetometer or X-ray machine amounts to a search within prohibition of the Fourth Amendment because it discloses hidden items within areas where there is a normal expectation of privacy, *United States v. Alvarado, supra,* 495 F.2d at 802-03, then the intrusion of a sniffing dog in search of marijuana must also fall within that prohibition when directed at hidden areas where there is similarly a normal expectation of privacy" *Bronstein, supra* at 464.

In a more recent case handed down from the Tenth Circuit, *United States v. MacDonald,* 670 F.2d 910 (1982), the Court of Appeals commented on the standard of reasonable suspicion required in utilizing a dog search in stating:

> Other courts that have addressed the substantive issue have held that so long as the police reasonably suspect criminal activity, they may temporarily detain baggage or move it to permit examination by drug-detecting dog without violating the baggage owner's Fourth Amendment interest in privacy.

*United States v. West,* 651 F.2d 71, 74 (1st Cir. 1981); *United States v. Viegas,* 639 F.2d 42, 54 (1st Cir.), *cert. denied,* 451 U.S. 970, 101 S. Ct. 2046, 68 L. Ed.2d 348 (1981); *United States v. Goldstein,* 635 F.2d 356, 361-62 (5th Cir.), *cert. denied,* ____ U.S.____, 101 S.Ct. 3111, 69 L. Ed.2d 972 (1981); *United States v. Klein,* 626 F.2d 22 (7th Cir. 1980).

Similarly, Judge Mansfield expressed the same concerns over such searches:

> [I]t is not unreasonable, where the police have reasonable grounds to suspect the presence of contraband, to permit use of an external method or device to determine whether the baggage contains contraband. On this ground I will uphold the search here. However, I will strictly limit such a search to cases where there are grounds for such a suspicion, similar to or stronger than that presented here. I would not permit a wholesale examination of all baggages in the hope that a crime might be detected.

*Bronstein, supra* at 465.

In the final analysis, the question of whether the use of a trained canine to detect the presence of concealed contraband is a search, must be determined by the justified-expectation-of-privacy-test applied originally in the case of *Katz v. United States, supra.* Under *Katz,* "the critical question is the kind of intrusion that a free society is willing to tolerate." That is, a valued judgment must be made whether the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints. In effect, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.

Totally unrestrained use of trained dogs, it is submitted, would not be consistent with the kind of open society to which we are committed. It would be intolerable if the police, in no way limited by the Fourth Amendment, were free to utilize dogs to undertake "a wholesale examination of all baggage in the hope that a crime might be detected" or "to roam the streets at will with trained dogs or sensor instruments, detecting the odor of marijuana and arresting

persons at will as a result." See *State v. Elkins*, 47 Ohio App. 2d 307, 357 N.E. 2d 716 (1976).

As Judge Mansfield so wisely cautioned us in *Brontein:*

> Otherwise, as the majority recognizes, the spectre of a "Big Brother" baggage search, uncurbed by the Fourth Amendment, would then loom much larger on the horizon. As more sophisticated detection devices are developed in the future, such a broad authority would be an open invitation to conduct blanket examinations, thus eroding the principals of the *Fourth Amendment* itself.

## CONCLUSION

Respondent prays that the Government's Petition For A Writ of Certiorari be denied.

Respectfully submitted,

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